

OCT 20 2014

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

NIDIA BERENICE FIGUEROA-
ZENDEJAS,

Defendant - Appellant.

No. 13-10085

D.C. No. 4:12-cr-01661-JGZ

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
John A. Jarvey, District Judge, Presiding**

Submitted October 14, 2014***

Before: LEAVY, GOULD, and BERZON, Circuit Judges.

Nidia Berenice Figueroa-Zendejas appeals from the district court's judgment and challenges the 36-month sentence imposed following her guilty-plea conviction for possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(vii). We have jurisdiction under 28 U.S.C. § 1291, and we vacate the sentence and remand for resentencing.

Figueroa-Zendejas contends that the district court committed reversible error

by miscalculating the advisory Guidelines range. We review for plain error. *See United States v. Vargem*, 747 F.3d 724, 727 (9th Cir. 2014). The government concedes the Guidelines calculation error, but contends that Figueroa-Zendejas has not shown that the district court's error was prejudicial. We disagree. Because the district court may have imposed a different sentence had it started its analysis with the correct Guidelines range, we conclude that the court's error affected Figueroa-Zendejas's substantial rights. *See id.* at 728-29. Accordingly, we vacate the sentence and remand for resentencing.

In light of our disposition, we do not reach Figueroa-Zendejas's other allegations of sentencing error.

VACATED and REMANDED for resentencing.

United States v. Figueroa-Zendejas, No. 13-10085

LEAVY, Circuit Judge, dissenting:

I respectfully dissent because the error is not one that “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Ameline*, 409 F.3d 1073, 1078 (9th Cir. 2005) (en banc) (internal quotation and citation omitted).